

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

PABLO HERNANDEZ
Claimant

VS.

NATIONAL SERVICE CO. OF IOWA, INC.
Respondent

AND

ZURICH AMERICAN INSURANCE CO.
Insurance Carrier

Docket No. 1,017,177

ORDER

Respondent and its insurance carrier (respondent) request review of the November 9, 2004 preliminary hearing Order entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

The ALJ ordered respondent to provide medical treatment to claimant's right small finger, presumably concluding that this injury arose out of and in the course of claimant's employment with respondent.

The respondent requests review of this decision alleging that the ALJ erred when she concluded claimant's injury arose out of and in the course of his employment. Respondent maintains that the greater weight of the evidence suggests claimant's injury occurred while he was at home rather than at work. Respondent points to the entries contained within the medical records which indicate claimant told the emergency room personnel that he injured his finger when his hand got caught in the garbage disposal while he was working in his kitchen at home. That, along with the testimony of Miguel Garcia,

claimant's supervisor, which indicates that claimant told him that he had hurt his hand at home, supports respondent's position that the ALJ's decision should be reversed.

Claimant has filed no brief, but presumably would urge the Board to affirm the ALJ's preliminary hearing Order. At the preliminary hearing claimant's counsel argued that it would have been impossible for claimant to have hurt his hand at home, still appear for work at his normal time of 11:00 p.m., and remain at the plant with his hand bleeding, until 1:30 a.m. when he paged Mr. Garcia. Thus, the more logical conclusion is, based upon claimant's testimony, that he injured his hand when he fell at work at approximately 1:30 a.m.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

At the preliminary hearing which was held on November 8, 2004, the claimant testified that he injured his right small finger on April 9, 2004 when he fell at work. Specifically, he described falling backwards and "[t]he metal parts on the hose that we use to spray down, when I fell back, they got me against the floor and it ripped off the nail."¹ According to claimant this fall was witnessed by two co-employees who, despite being his friends, he could not name.

Claimant then went to the office and paged Miguel Garcia, the safety supervisor, to tell him of the accident. This happened at approximately 1:30 or 1:40 a.m. Claimant has known Mr. Garcia for years and the two are (according to Mr. Garcia) friends in addition to co-workers. The two went to another office and ultimately to the nurse's station. Alvaro Gomez and Juan (Johnny) Aldana, both "yellow hats" (supervisors), also came to the office and looked at his hand. These two men then left.

Mr. Garcia denies that claimant told him he hurt his finger at work. Instead, Mr. Garcia testified that when he met up with claimant on April 9, 2004, claimant showed him his hand by taking off his glove. Mr. Garcia inquired as to what had happened and said that claimant replied "don't worry, it was something at the house."² According to Mr. Garcia, there was never any mention made of falling and hurting his finger during this conversation.

¹ P.H. Trans. at 6. This allegation is inconsistent with the contents of the E-1 where claimant alleged a series of repetitive injuries.

² *Id.* at 18.

Mr. Garcia helped clean claimant's finger and there was a discussion about whether claimant should go to the hospital. Eventually claimant decided he should seek further medical treatment and Mr. Garcia was directed to take him. It took until approximately 3:30 a.m. for this decision to be made and for Mr. Garcia to actually get claimant to the hospital.

Claimant was taken to the local hospital and according to the medical records, an interpreter was present for the intake and/or treatment process. The record indicates claimant was initially seen by the triage nurse at 3:30 a.m. with the assistance of an interpreter. However, claimant denies there was any interpreter at the hospital. It is undisputed that claimant does not speak English and that Miguel Garcia speaks limited English.

According to claimant, Mr. Garcia provided the hospital with an "invented" history about the cause of his injury.³ He says Mr. Garcia told the hospital personnel that claimant hurt his hand in a garbage disposal at home rather than at work. Claimant testified that "the hospital will have more consideration if it happened there [at home] instead of what they would normally charge if it happened at a company."⁴ Claimant adamantly denies injuring his finger at home, but admits he did nothing to correct Mr. Garcia's recitation of the events. When asked to explain why he didn't speak up claimant testified that he and Mr. Garcia didn't speak much because of claimant's ongoing but separate workers compensation claim stemming from a shoulder injury.

Mr. Garcia denies providing a history to the hospital personnel and further testified that it was claimant, not he, who provided the history to the hospital personnel. He first heard the term "garbage disposal" mentioned by claimant while at the hospital.

Juan (Johnny) Aldana also testified. He stated he heard claimant's page and responded to see what was going on. He arrived at the nurse's office and saw claimant washing his hand and heard the discussion between claimant and Mr. Garcia about how claimant wanted Mr. Garcia to remove the partially detached fingernail. Mr. Garcia explained, in Spanish, to Mr. Aldana, in claimant's presence, that claimant told him he injured his finger in an accident at home. Mr. Aldana did not speak with claimant, again due to the pending workers compensation claim.

During his treatment at the emergency room, claimant's finger was sutured, but a fracture was identified. He ultimately had to undergo surgery to place a pin in his finger. Some of the additional treatment records were included as exhibits at the preliminary hearing. When claimant sought treatment at the Garden Medical Clinic on April 14, 2004, the chart notes show that a history was obtained through a Spanish speaking interpreter.

³ *Id.* at 10.

⁴ *Id.* at 9.

The note references a “laceration to 5th finger (RT)” and “ER - 4-9-04 - Garbage Disposal”.⁵ For the next visit on April 21, 2004, there is a very similar notation. Claimant’s “history was obtained thru Spanish interpreter” and there is an additional notation that claimant “cut finger garbage disposal”.⁶ It does not appear that any of respondent’s representatives were at any of these appointments.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁷ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁸

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.⁹

The Board has found that where there is conflicting testimony, as in this case, credibility of the witnesses is important. Here, the ALJ had the opportunity to personally observe the claimant and respondent’s representatives testify in person. In granting the claimant’s request for medical treatment the ALJ apparently believed the claimant’s testimony over that of the respondent’s. The Board concludes that some deference may be given to the ALJ’s findings and conclusions because she was able to judge the witnesses’ credibility by personally observing them testify. However, this case turns not only upon the witnesses’ testimony, but on the medical records.

Here, the medical records clearly indicate that a history was obtained while claimant was at the hospital and that an interpreter was available, although claimant denies this. Mr. Garcia denies providing the history and this is somewhat logical as he speaks little English, so he could neither translate for claimant or the physicians. The Board finds it is more probably true than not that claimant was the source of the history of his injury rather than Mr. Garcia and that there was, more likely than not an interpreter available that night, and that in fact, claimant injured himself while at home and not at work as he alleges. This

⁵ *Id.*, Resp. Ex. 3 at 13.

⁶ *Id.*, Resp. Ex. 3 at 9.

⁷ K.S.A. 44-501(a).

⁸ K.S.A. 44-508(g).

⁹ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

finding is supported by the fact that during at least two follow up visits, with the aid of an interpreter, the history of claimant hurting himself in an accident at home with a garbage disposal was restated. There was no reason for claimant to reiterate the manufactured story at these later visits. None of respondent's representatives were present at these appointments and it appears from the record that his private health carrier paid at least some of the bills. If that were not the truth, claimant had at least two chances to correct the record and stop the perpetuation of a falsehood.

For these reasons, the Board finds the ALJ's preliminary hearing Order should be reversed. The Board finds that claimant has failed to satisfy his burden of proving that his accidental injury arose out of and in the course of his employment with respondent.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Pamela J. Fuller dated November 9, 2004, is reversed.

IT IS SO ORDERED.

Dated this _____ day of March, 2005.

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director